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BY RONALD B. SANDERSON

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No. 80393-5

SUPREME COURT OF THE STATE OF WASHINGTON

The Honorable Richard B. Sanders,

Petitioner,

v.

The State of Washington,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER THE HONORABLE
RICHARD B. SANDERS REGARDING OFFICIAL CAPACITY

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I. INTRODUCTION

“In the instant case, Justice Sanders’ actions were not simply undertaken as a private citizen, but rather within the context of his judicial duties.”

In re Disciplinary Proceeding Against Sanders, 159 Wn.2d 517, 523, 145 P.3d 1208 (2006)

RCW 43.10.030(3) and .040 mandate that the Attorney General’s Office (“AGO”) defend state officers in any legal, quasi-legal or administrative proceeding involving acts taken within their official capacity. While the term official capacity has not been interpreted for purposes of .030(3), this Court has defined the term in other contexts by distinguishing between acts carrying out official duties and acts taken in an official’s private life.

The Commission on Judicial Conduct (“CJC”), this Court on appeal from the CJC, and the trial court and Court of Appeals in the present case, all ruled that Justice Sanders acted in his official capacity during his visit to the McNeil Island Special Commitment Center (“SCC”). The CJC and this Court analyzed Justice Sanders’ official capacity in the context of his disciplinary proceeding. Not only is that an appropriate point of guidance, the CJC proceeding was the exact proceeding for which Justice Sanders requested the AGO provide him a defense. Accordingly, Justice Sanders’ official capacity as determined by the CJC and this Court on appeal is directly applicable to the present case

and the interpretation of the terms official capacity in .030(3) and state official in .040.

Moreover, the AGO never appealed the trial court's finding of fact that Justice Sanders acted in his official capacity during his visit to the SCC. An unchallenged finding of fact is taken as a verity.

Even if this Court chooses to revisit the specific facts of Justice Sanders' visit, substantial evidence supports the trial court's ruling. Because the plain language of .030(3) and .040 requires the AGO provide a defense when state officers act in their official capacity, this Court should hold that the AGO failed to meet its statutory duty.

II. SUPPLEMENTAL STATEMENT OF THE CASE

On December 17, 2002, all nine Supreme Court Justices were invited to visit the SCC. Supp. CP 227. Initially, a number of Justices, including Justice Sanders, Justice Mary Fairhurst and Justice Faith Ireland expressed interest in attending. Supp. CP 228. Judges are encouraged to visit state facilities in their official capacity as part of their normal duties. Supp. CP 234. Accordingly, Justice Sanders was granted Mandatory Continuing Judicial Education ("MCJE") credit for his visit to the SCC. CP 78-79.

Justice Sanders coordinated with the superintendent of the SCC to arrange the visit. Supp. CP 227. During the visit, Justice Sanders spoke to

approximately 20 residents, mostly in group settings. Supp. CP 230. During these conversations, Justice Sanders repeatedly warned the residents he could not speak to them regarding their individual cases. Supp. CP 230. In the course of the tour, two residents handed Justice Sanders documents. Supp. CP 230-231. When Justice Sanders subsequently learned that one of the residents who handed him a document had a case pending before the Court, he recused himself from the resident's case. Supp. CP 231.

The CJC ruled that Justice Sanders did not exercise prudent judgment during his visit. Supp. CP 233. Specifically, the CJC ruled that Justice Sanders' "lapses" violated Canons 1 and 2(A) by impairing public confidence in the integrity and appearance of impartiality of the judiciary. Supp. CP 233. The CJC cited examples of Justice Sanders' conduct in support of its conclusion, including his acceptance of two documents from residents at McNeil Island, his failure to run a computer search for potential conflicts and his discussions with residents regarding the issue of volitional control. Supp. CP 233.

The CJC also ruled that Justice Sanders' lapses in judgment "took place in the Justice's official capacity." Supp. CP 236 (emphasis added). The CJC reached this conclusion after examining "[w]hether the misconduct occurred in the judge's official capacity or in the judge's

private life,” as prescribed by the CJC Rules of Procedure and this Court’s precedent. Supp. CP 235; *see also* CJCRP 6(c); *In re Disciplinary Proceeding Against Deming*, 108 Wn.2d 82, 119-20, 736 P.2d 639 (1987). The CJC found that Justice Sanders’ communications with residents at the SCC took place within his official capacity and did not constitute private activity. Supp. CP 236. Further, the CJC ruled that Justice Sanders’ actions did not violate Canon 3(A)(4)’s prohibition on *ex parte* contacts. Supp. CP 232.

Justice Sanders appealed the CJC’s ruling that he violated Canons 1 and 2(A) and his consequent sanction. *In re Disciplinary Proceeding Against Sanders*, 159 Wn.2d 517, 145 P.3d 1208 (2006). On appeal, this Court affirmed the CJC’s findings of fact and held that Justice Sanders’ “judicial conduct can provide a basis for a violation of Canons 1 and 2(A). In the instant case, Justice Sanders’ actions were not simply undertaken as a private citizen, but rather within the context of his judicial duties.” *Id.* at 523 (emphasis added). Further, this Court held that the CJC “correctly applied the 10 nonexclusive factors as set forth in CJCRP 6(b)¹ and in *Deming*,” including whether Justice Sanders’ actions at the SCC took place in his official capacity. *Id.* at 527.

While the CJC proceeding was pending, Justice Sanders filed the

Complaint in the present case requesting that the AGO provide a defense pursuant to .030 and .040. CP 4-8. The parties filed cross-motions for summary judgment, both of which the trial court denied. CP 167-169. In its Order, the trial court ruled that “Justice Sanders was acting in his official capacity when he visited the special offender unit at McNeil Island. That visit is the subject of the Judicial Conduct Commission Proceedings.” CP 168 (emphasis added). The AGO did not appeal the trial court’s Order denying the cross-motions for summary judgment and its partial findings of fact.

Despite the CJC’s and trial court’s rulings, the AGO contended in its opening brief to the Court of Appeals that neither body ruled that Justice Sanders acted in his official capacity. Brief of Respondent State of Washington (hereinafter “Br. of Resp’t”), p. 21. The Court of Appeals summarily rejected the AGO’s argument by stating “there is no dispute that Justice Sanders is a state official and...the Commission found that he was acting in his official capacity when he visited the SCC....” *Sanders v. State*, 139 Wn. App. 200, 206, 159 P.3d 479 (2007). The Court of Appeals ultimately held that the Ethics in Public Service Act, ch. 42.52 RCW, applies and that Justice Sanders was not entitled to a defense. *Id.* at 212-13. Justice Sanders petitioned for review, and this Court heard oral

¹ Currently CJCRP 6(c).

argument on December 10, 2008.

On January 6, 2009, this Court issued an Order requesting each party submit supplemental briefing on the term “state officer acting in his official capacity” in RCW 43.10.030(3) and on the term “official of the state” in RCW 43.10.040, as relevant to the facts of this case.

III. STANDARD OF REVIEW

The trial court made a finding of fact that Justice Sanders acted in his official capacity while visiting the SCC. CP 168; *see also* CR 56(d). On appeal, findings of fact are reviewed to determine whether they are supported by substantial evidence. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Substantial evidence exists if the record contains evidence of such sufficient quantity to “persuade a fair-minded, rational person of the truth of a declared premise.” *In re Disciplinary Proceedings Against Bonet*, 144 Wn.2d 502, 511, 29 P.3d 1242 (2001) (quoting *In re Welfare of Snyder*, 85 Wn.2d 182, 185-86, 532 P.2d 278 (1975)). Great deference is given to the trial court’s factual findings. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). But even if this Court employs *de novo* review, it should still hold that Justice Sanders is a state official who was acting in his official capacity and is, therefore, entitled to a defense.

IV. ARGUMENT

A. The AGO's Duty to Defend Applies When a Judge Carries Out Judicial Duties.

Two statutes apply to this dispute. RCW 43.10.030(3) provides that: "The attorney general shall...[d]efend all actions and proceedings against any state officer or employee acting in his official capacity, in any of the courts of this state or the United States." (emphasis added). RCW 43.10.040 extends the AGO's duty by requiring that "[t]he attorney general shall also represent the state and all officials...before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings...." (emphasis added). Both statutes apply to Justice Sanders' actions at the SCC.

1. Supreme Court Justices are State Officers and Officials.

Justice Sanders, a sitting Supreme Court Justice, is a state officer and official. *See Sanders*, 139 Wn. App. at 206. The AGO's duty to defend extends to state officers (.030(3)) and state officials (.040). Washington's constitution creates the office of Supreme Court Justice. Const. art. IV, § 2. Justices are elected to their positions by the people of the state in general elections. Const. art. IV, § 3. Upon assuming office, justices take an oath to uphold the state constitution. RCW 2.04.080. Further, the state directly employs and pays Supreme Court justices.

Const. art. IV, § 13. Court decisions addressing the status of judges come to the same conclusion. See *State ex rel. Edelstein v. Foley*, 6 Wn.2d 444, 447-49, 107 P.2d 901 (1940) (holding that superior court judges are “state officers” under Const. art. IV); *McMillian v. Monroe County*, 520 U.S. 781, 792, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997) (noting that state judges are considered state officials) (cited in *Whatcom County v. State*, 99 Wn. App. 237, 249, 993 P.2d 273 (2000)). For the purposes of .030 and .040, a sitting Supreme Court justice is a state officer and official.

2. Judges Act in their Official Capacity When they Carry Out their Judicial Duties.

Section .030(3) contains the proper standard for determining when the AGO must represent a state officer – the AGO is obligated to defend state officers “acting in [their] official capacity.” No cases interpret the term “official capacity” in the context of .030(3).

Cases that interpret the phrase in other statutes draw the distinction between acts taken within the scope of official duties and acts taken in a personal capacity. For example, in *State v. O’Neil*, 103 Wn.2d 853, 858, 700 P.2d 711 (1985), this Court addressed the meaning of the phrase “action in [one’s] official capacity” under Washington’s bribery statute, RCW 9A.68.010(1)(a). This Court held that official capacity “simply means that the public servant is acting within the scope of what he or she

is employed to do as distinguished from being engaged in a personal frolic.” *Id.* at 859.

This Court and the CJC make a similar distinction when they examine whether or not a judge’s actions for which a sanction is appropriate took place in the judge’s official capacity. In the judicial discipline context, misconduct that occurs in a judge’s official capacity is defined in contrast to misconduct that occurs in the judge’s private life. CJCRP 6(c)(1)(D).² For example, in *In re Disciplinary Proceedings Against Turco*, 137 Wn.2d 227, 970 P.2d 731 (1999), Judge Turco was sanctioned for pushing his wife at a holiday dinner. This Court held that Judge Turco’s misconduct occurred in his private life and therefore it did not constitute official capacity action. *Id.* at 250.

In contrast, this Court recognizes that acts pursuant to a judge’s duties are taken in an official capacity. Indeed, sometimes it is because a judge is acting in an official capacity that the ethical violation occurs. In *In re Disciplinary Hearing Against Hammermaster*, 139 Wn.2d 211, 245-46, 985 P.2d 924 (1999), this Court held that Judge Hammermaster engaged in official capacity conduct that violated the Canons when he

² The CJC considers official capacity as one of the mitigating or aggravating factors used to determine the appropriate sanction. *In re Sanders*, 159 Wn.2d at 527. This Court originally established official capacity as a relevant factor through case law and the CJC subsequently adopted the rule into CJC Rule of Procedure 6(c). See *In re Deming*, 108 Wn.2d at 119-20; CJCRP 6(c).

made improper threats of life imprisonment and indefinite jail sentences, improperly accepted guilty pleas, held trials in absentia, and engaged in a pattern of undignified and disrespectful conduct towards defendants. *See also In re Disciplinary Proceeding Against Michels*, 150 Wn.2d 159, 170, 75 P.3d 950 (2003) (finding that a judge subject to sanctions acted in his official capacity when he accepted guilty pleas from defendants whom he represented as a public defender and without obtaining proper written plea statements).

This Court should follow its jurisprudence in *O'Neil* and the disciplinary hearing context and equate official capacity in .030(3) with acts a judge takes when carrying out official duties. Such a rule is easily justiciable and gives effect to the plain language of the statute.

Moreover, distinguishing judicial duties from private life for the purpose of determining official capacity comports with the reality that justices' duties often take place outside the courtroom. For example, justices serve in their official capacity when they create court rules and impose or follow MCJE requirements.³ Justices also regularly serve as representatives of the Court, such as when the Chief Justice reports to the

³ The Supreme Court's website lists numerous programs and organizations in which justices participate in their official capacity outside of the courtroom. Washington Courts, http://www.courts.wa.gov/programs_orgs.

legislature on the State of the Judiciary⁴ and when justices participate on Commissions.⁵ In each instance, justices perform acts within the scope of their judicial duties without donning robes. Indeed, participation in continuing judicial education is in and of itself a judicial act vital to the office:

The protection of the rights of free citizens depends upon the existence of an independent and competent judiciary. The challenge of maintaining judicial competence requires ongoing education of judges in the application of legal principles and the art of judging in order to meet the needs of a changing society.

GR 26.

In sum, this Court should apply the rule used in *O'Neil* and judicial disciplinary proceedings to the instant case. A judge acts in an "official capacity" for purposes of .030(3) and .040 if the judge's actions are carried out as part of the judge's duties, not as part of the judge's private life.

B. The Actions for Which Justice Sanders was Sanctioned Took Place in His Official Capacity.

Justice Sanders acted in his official capacity during the entirety of his visit to the SCC. Justice Sanders took his visit to the SCC, for which he received MCJE credit, CP 78-79, in his official capacity. Indeed, the

⁴ See e.g., 2008 State of the Judiciary, available at <http://www.courts.wa.gov/newsinfo/content/stateOfJudiciary/january2008.pdf>.

⁵ For instance, the Gender and Justice Commission or Minority and Justice Commission.

AGO and CJC acknowledge that judges visit institutional facilities as part of their official duties. CP 11; Supp. CP 234. Nor did Justice Sanders somehow “step out” of his official capacity during the visit. The CJC examined the facts of Justice Sanders’ visit and concluded that “[a]ll of the misconduct took place in [Justice Sander’s] official capacity.” Supp. CP 236 (emphasis added). Further, this Court affirmed the CJC’s decision and plainly stated that the actions for which Justice Sanders was sanctioned “were not simply undertaken as a private citizen, but rather within the context of his judicial duties.” *In re Sanders*, 159 Wn.2d at 523.

The facts demonstrate that Justice Sanders acted at all times in his official capacity as a Supreme Court justice and never as a private citizen. The CJC cited examples of conduct during the visit that supported its decision to sanction Justice Sanders. *See* Supp. CP 233-234. Among these actions were Justice Sanders’ failure to inquire as to whom he was to meet, his acceptance of the two letters, the discussion of volitional control during the visit, and the potential for confusion as to the purpose of the visit. Supp. CP 233-234. This is not a case where, for example, a judge runs a personal errand en route to a judicial function – all of Justice Sanders’ activities here were part of his judicial visit to the SCC. Indeed, the CJC characterized these actions as essentially lapses in judicial

judgment – conduct that should not have been undertaken but that was not a “personal frolic.”

The AGO has previously asserted that a violation of the Canons can never qualify as conduct taken in an official capacity. *See* Br. of Resp’t, p. 23. The AGO errs in this conclusion. The CJC and this Court have already established that Justice Sanders’ misconduct occurred in the course of his judicial duties. Indeed, this Court has repeatedly upheld violations of the Canons for conduct taken within a judge’s official capacity.⁶ Accepting the AGO’s conclusion would eviscerate this well established rule.

When a judge acts in an official capacity, then the plain language of .030(3) and .040 obligate the AGO provide a defense. Here, “there is no dispute that Justice Sanders is a state official and [] the Commission found that he was acting in his official capacity when he visited the SCC....” *Sanders*, 139 Wn. App. at 206; *see also* Supp. CP 236. As such, Justice Sanders was entitled to a defense.

C. Representation Under Section .040 is Not Limited to Official Capacity Acts.

Even if this Court were to hold contrary to its prior opinion and now determine that Justice Sanders did not act in his official capacity, then

⁶ *See e.g., In re Sanders*, 159 Wn.2d 517; *In re Disciplinary Proceeding Against Michels*, 150 Wn.2d 159, 75 P.3d 950 (2003); *In re Disciplinary Proceeding Against*

Justice Sanders still prevails because .040 imposes an unqualified duty for the AGO to defend him before the CJC. The AGO argued to the trial court that .030(3)'s requirement of official capacity extends to .040. Justice Sanders has accepted this argument for the purpose of addressing official capacity. However, .040's plain language includes no such limitation. Section .040 requires that the AGO defend state officials "before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings." .040. A CJC proceeding falls within the scope of .040's broad language.

Justice Sanders argued at the trial court that summary judgment was appropriate because the plain language of .040 applies on its face. CP 34-35. Even though .040 does not include an official capacity requirement, the trial court agreed with the AGO that .040 should be read in harmony with, and as an extension of, .030(3) and applied the official capacity standard to .040. *See* CP 88-90, 168; Supp. CP 279-80. If this Court examines only the requirements of .040, the plain language dictates that the AGO must defend judges before the CJC.

If this Court, however, decides to analyze .040 in the context of ch. 43.10 RCW, the AGO has already admitted that the proper limitation on .040 is that of official capacity from .030(3). *See* Supp. CP 279-80. As

Hammermaster, 139 Wn.2d 211, 985 P.2d 924 (1999).

argued above, Justice Sanders acted at all times in his official capacity as a state officer and official. Justice Sanders should prevail regardless of whether the plain language of .040 applies on its face or if it is modified by .030(3).

D. The AGO Failed to Challenge the Trial Court's Findings.

Unchallenged findings of fact are taken as verities on appeal. *Davis v. Dep't of Labor & Industries*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980). The AGO failed to properly assign error to any of the trial court's findings of fact, including the finding that Justice Sanders acted in his official capacity. CP 168. Indeed, the AGO did not even file a cross-appeal once Justice Sanders appealed the trial court's order. As such, that Justice Sanders' conduct constituted "official capacity" should be treated as a verity, and the plain language of .030(3) mandates that the AGO provide a defense.

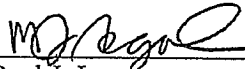
V. CONCLUSION

Section .030(3) and .040 obligate the AGO to provide a defense when a state officer or official acts in an official capacity. There is no limitation to this duty. This Court has interpreted official capacity in other contexts by distinguishing between acts taken in the course of judicial duties and those taken in an official's private life. This Court should apply the same distinction here. Further, the CJC, the trial court, the Court of

Appeals, and this Court examined the facts of this case and found that Justice Sanders acted in his official capacity throughout his visit to the SCC. While the AGO's failure to appeal the trial court's finding that Justice Sanders acted in his official capacity forecloses the issue, review of the record confirms that there is more than substantial evidence to support the trial court's finding. Because Justice Sanders carried out his judicial duties during the entirety of his visit to the SCC, he acted within his official capacity and the AGO has a statutory duty to provide a defense.

DATED this 22nd day of January, 2009.

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Attached please find the Supplemental Brief of Petitioner the Honorable Richard B. Sanders Regarding Official Capacity and the accompanying Certificate of Service. This document is being filed by Matthew J. Segal, WSBA#29797.

Should you have any questions, please do not hesitate to contact me.

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